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# A LEGISLATIVE REVIEW OF RESTRICTIVE PROVISIONS GOVERNING WOMEN'S ACCESS TO ABORTION IN THE EASTERN CARIBBEAN

MARCH 2020

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ANIKA GRAY & TAITU HERON

**THIS WORK HAS BEEN COMMISSIONED BY THE EQUALITY AND JUSTICE ALLIANCE, THE EASTERN CARIBBEAN ALLIANCE FOR DIVERSITY AND EQUALITY AND THE WOMEN AND DEVELOPMENT UNIT OF THE UNIVERSITY OF THE WEST INDIES OPEN CAMPUS.**

#### **About Equality & Justice Alliance**

The Equality & Justice Alliance is a consortium of international organisations with expertise in advancing equality, addressing the structural causes of discrimination and violence, and increasing protection to enable strong and fair societies for all Commonwealth citizens, regardless of gender, sex, sexual orientation, or gender identity and expression. The members of the Alliance are the Human Dignity Trust, Kaleidoscope Trust, Sisters for Change, and the Royal Commonwealth Society.

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Established in 2011, Kaleidoscope Trust works to uphold the human rights of lesbian, gay, bisexual and transgender (LGBT+) people in countries around the world where they are discriminated against or marginalised due to their sexual orientation, gender identity and/or gender expression. Since 2013, our organisation has hosted the Secretariat of the Commonwealth Equality Network (TCEN), which provides a unique space for LGBT+ advocates to challenge inequality in the Commonwealth, including by advocating for better national and regional policies, laws, and priorities of Commonwealth governments. To date, TCEN consists of 56 member organisations from all five regions of the Commonwealth. Kaleidoscope Trust is also civil society Co-Chair of the Equal Rights Coalition, which works to advance the human rights of LGBT+ people and promote inclusive development of LGBT+ persons globally.

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WAND is a department of the UWI Open Campus located in Barbados that centres women and their families in Caribbean development by doing community outreach, public fora, online & virtual learning, policy development and applied research.

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#### **A Legislative Review of Restrictive Provisions Governing Women's Access to Abortion in the Eastern Caribbean**

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GOVERNING WOMEN'S ACCESS TO ABORTION IN  
THE EASTERN CARIBBEAN

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# LIST OF

## ACRONYMS, TABLES & FIGURES

### ACRONYMS

CARICOM	Caribbean Community
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CRC	Convention of the Rights of the Child
ECHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development
ICESCR	International Covenant on Economic, Social and Cultural Rights
OECS	Organisation of the Eastern Caribbean States

### TABLES

Table 1	Outline of Abortions Laws in 6 Eastern Caribbean Countries
Table 2	International Human Rights Obligations of the OECS Countries and Relevance to Abortion Rights

### FIGURES

Figure 1	Categories of Abortion Laws and 6 Eastern Caribbean Countries
Figure 2	Summary of International Jurisprudence on the Rights of Women and Girls to Access An Abortion
Figure 3	Summary of Guyana's Legal Framework on Abortion
Figure 4	Summary of Barbados' Legal Framework on Abortion

# TABLE OF CONTENTS

6	Introduction
8	Abortion Legislation in 6 OECS Countries
9	Table 1: Outline of Abortions Laws in 6 Eastern Caribbean Countries
12	Figure 1. Categories of Abortion Laws and 6 Eastern Caribbean Countries
13	International Obligations of 6 OECS Countries and Access to Safe Abortion Services
14	Table 2: International Human Rights Obligations of the OECS Countries and Relevance to Abortion Rights
15	International Jurisprudence on Access to Abortion
17	Figure 2. Summary of International Jurisprudence on the Rights of Women and Girls to Access An Abortion
18	Impact of National Legislation on the Rights of Women and Girls in the OECS
23	Comparative Legal Regime on Abortion in Guyana and Barbados
23	Figure 3. Summary of Guyana’s Legal Framework on Abortion
24	Figure 4. Summary of Barbados’ Legal Framework on Abortion
26	Recommendations for Law Reform in the 6 OECS Countries
30	Conclusion
31	Footnotes

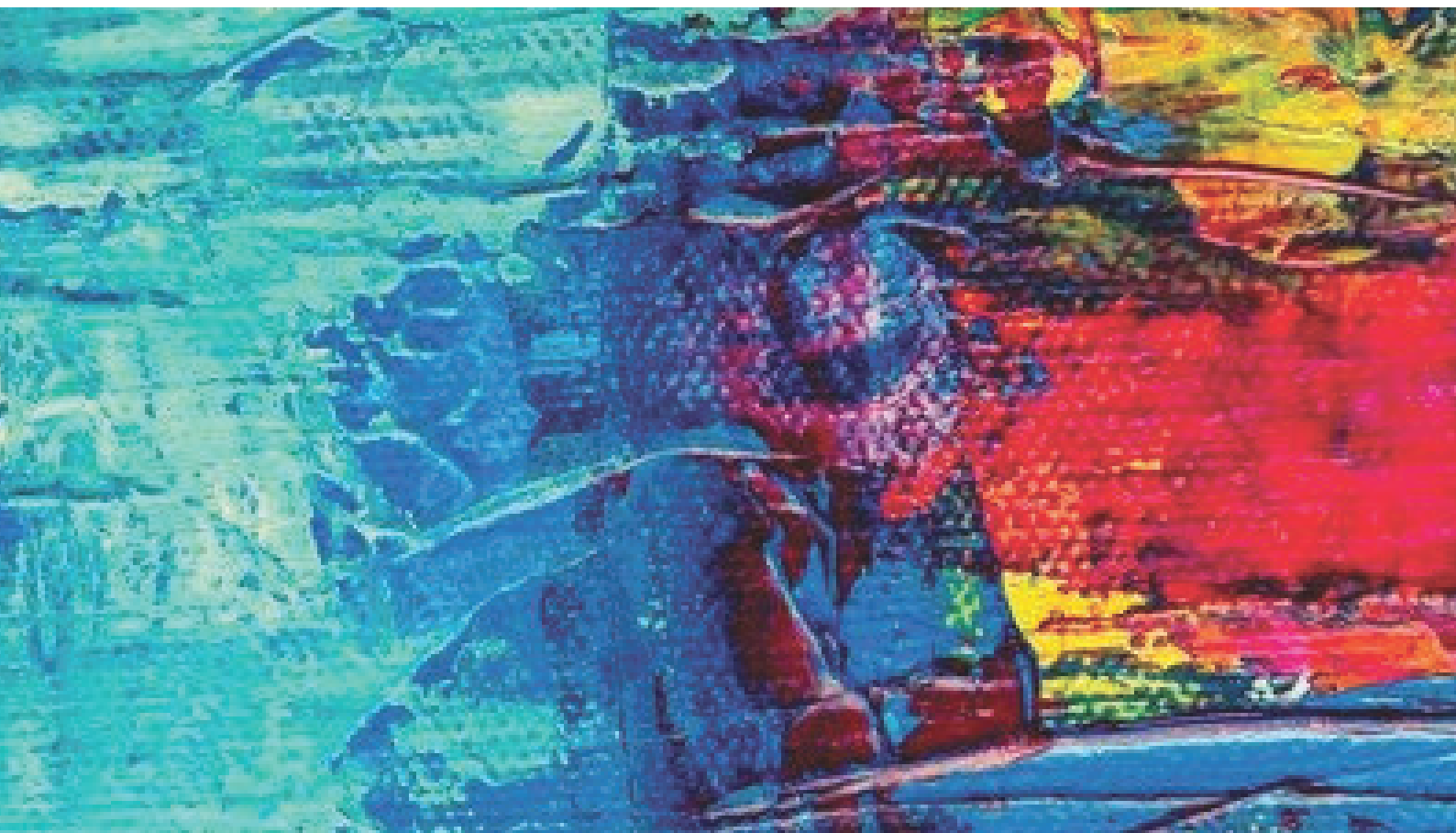
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# I. Introduction

Access to safe, affordable and legal abortions for women and girls in the Eastern Caribbean, particularly those of the Organisation of the Eastern Caribbean States (OECS) are issues of gender equality, human rights and public health. All three are intimately and inexorably connected. Criminal abortion laws are first and foremost a policing of women's reproductive function. They are aimed at forcing women into motherhood under the guise of providing protection to the unborn and safeguarding society's ability to recreate itself.

**The laws are therefore the product of gender ideologies; which view women's value as being predicated on the ability to bear children but having no authority to determine how or when they should carry out this function.**

These gender ideologies perpetuate the notion that women's bodies are not their own but the property of men and the masculine state. Women's citizenship is therefore secondary to her role as mother. These sexist ideologies run counter to our present day understanding of human rights. As women are also human beings, they have the right to bodily autonomy, privacy and to be free from inhumane and cruel treatment.



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Criminal abortion laws, which stifle women's and girls' ability to determine how and when they become mothers, violate all three rights.

Abortion laws in the Eastern Caribbean, like other parts of the world, infringe women's and girls' rights have grave consequences for women's and girls' health. Restrictive abortion laws are a key determinant of unsafe abortions, which lead to medical complications resulting in high rates of maternal morbidity and mortality[1]. Worldwide an estimated 680,000 women die yearly from unsafe abortions and in some Caribbean countries it is a leading cause of maternal deaths especially amongst adolescent girls[2]. Invariably, restriction on abortions disproportionately affects women who are already disadvantaged as a result of age, sexual orientation and low socio-economic status.[3] Liberalising abortion laws in the Eastern Caribbean is therefore an imperative to achieving gender equality and protecting women's and girls' right to equality, privacy, bodily autonomy and health.

Restrictive abortion laws, which violate reproductive, liberty and equality rights, implicate women's and girls' rights to equal citizenship. Citizenship is the recognition of an individual's membership in the society and "the rights and responsibilities conferred by that membership"[4]. Human rights, and their embodiment in constitutional values, exist for the benefit of all citizens, regardless of sex, gender or other identities.

Member states of the OECS have a positive duty to guarantee these rights for all citizens. States with restrictive abortion laws and policies are in breach of this duty since women and girls are excluded from benefiting from the rights guaranteed to them as members of society. This exclusion is particularly egregious because it marginalises the concerns and needs of half the human population. For lesbian and bisexual women, the marginalisation is compounded - in addition to not having their reproductive rights protected, they also must face state sanctioned discrimination and, obstacles in accessing reproductive services, and in some cases, criminalisation for their sexual orientation.

The purpose of this report is therefore to examine legal provisions governing abortion in Antigua & Barbuda, Dominica, Grenada, St Kitts & Nevis, St Lucia and, St Vincent and the Grenadines. The report identifies the ways in which the laws discriminate against women and girls. The paper uses international law and the international obligations of the six OECS countries to contextualise the extent to which these laws are in violation of human rights standards regarding women's and girls' right to access safe and affordable abortion. The paper ends by giving recommendations for reforming the legislative framework for abortions in the 6 named countries. The recommendations are informed by the experience in Canada, Barbados and Guyana.

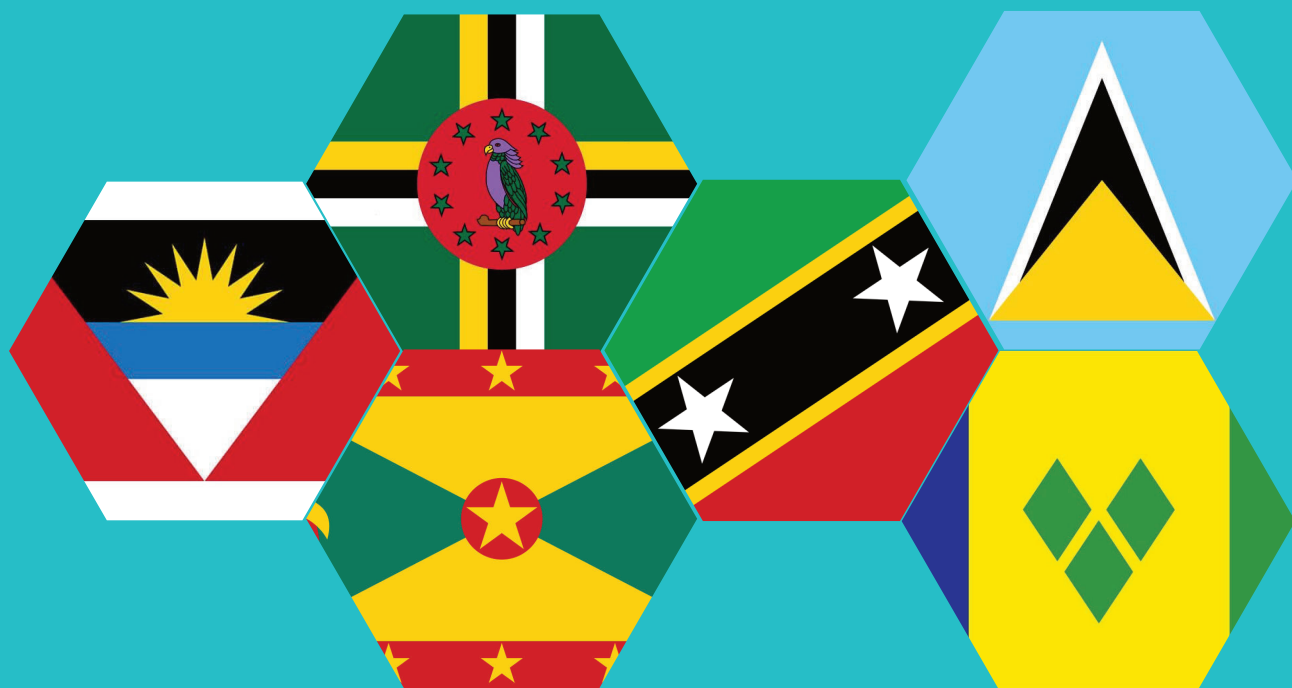


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## II. Abortion Legislation in 6 OECS Countries

The laws on abortion in the 6 OECS countries are all adopted from and influenced by a British colonial era law titled the Offences Against the Person Act, 1861. Some of the countries like Antigua and Barbuda, St Kitts and Nevis and Dominica have maintained the colonial era law without changes. Whilst St Lucia, St Vincent and the Grenadines and Grenada made changes to their laws, the ethos of the colonial era law remains.

Like the 1861 law, abortion is criminalised in all six countries. However, exceptions to the criminal sanctions can be found in statute and is also supported by the decision in an old English case called *R v Bourne*.<sup>[1]</sup> *Bourne* involved a medical doctor who had performed an abortion for a teenager whose pregnancy was the result of a rape. The doctor was charged under the 1861 law for committing an abortion but argued that he did the abortion in order to protect the mental health of the girl. The court dismissed the charge against the doctor and held that the 1861 Act only criminalised unlawful abortions. Abortions were therefore to be considered lawful if they were necessary to protect the health (mental or physical) of the mother.



**TABLE 1****ANTIGUA  
AND BARBUDA****DOMINICA****Laws  
Criminalising  
Abortion**

- Sections 53-54 of the Offences Against the Person Act,1873.
- Sections 2(1) and (2) of the Infant Life Preservation Act, 1937 (referred to as child destruction)
- Sections 56-57 of the Offences Against the Person Act,1873.
- Sections 8 (1) and (2) of the Offences Against the Person Act, 1973

**Who can face  
criminal  
sanctions**

- The pregnant woman who attempts or completes the abortion.
- Anyone who attempts to or carries out an abortion.
- Anyone who knowingly supplies or procures any items to be used in carrying out an abortion.
- Anyone who aborts a foetus 28 weeks or more and which is capable of being born alive
- The pregnant woman who attempts or completes the abortion.
- Anyone who attempts to or carries out an abortion.
- Anyone who knowingly supplies or procure any item to be used in carrying out an abortion.
- Anyone who aborts a foetus 28 weeks or more and which is capable of being born alive

**Type of criminal  
sanctions imposed  
if found guilty**

- 10 years imprisonment
- 10 years imprisonment
- 2 years imprisonment
- Life imprisonment
- 10 years imprisonment
- 10 years imprisonment
- 2 years imprisonment
- Life imprisonment

**Laws Creating  
Exception to  
Criminalisation**

- Section 2(1) of the Infant Life Preservation Act, 1937.
- R v Bourne [1939] 1 K. B. 687
- Section 2(1) of the Infant Life Preservation Act, 1937.
- R v Bourne [1939] 1 K. B. 687

**Circumstances  
where abortion  
can be carried out  
legally**

- To save the life of the woman, which includes the preservation of physical and mental health.
- To save the life of the woman, which includes the preservation of physical and mental health.

# TABLE 1

## GRENADA

## STKITTS AND NEVIS

### Laws Criminalising Abortion

- Sections 23 and 247 of the Criminal Code of 1987.

- Sections 53 and 54 Offences Against the Person Act 1873, revised 31 December 2002.

### Who can face criminal sanctions

- Anyone (the pregnant woman and any other person) who causes an abortion.
- Anyone who causes the premature delivery of a child for the purpose of hastening the child's death.

- The pregnant woman who attempts an abortion.
- Anyone who attempts to carry out an abortion.
- Anyone who knowingly supplies or procures any item to be used in carrying out an abortion.
- Anyone who aborts a foetus 28 weeks or more and which is capable of being born alive.

### Type of criminal sanctions imposed if found guilty

- 10 years imprisonment
- 10 years imprisonment

- Maximum 10 years imprisonment with or without hard labour.
- Maximum 10 years imprisonment with or without hard labour.
- Maximum 2 years with or without hard labour.
- Life imprisonment with or without hard labour

### Laws Creating Exception to Criminalisation

- Section 250 of the Criminal Code of 1987.

- Section 2(1) of the Infant Life Preservation Act, 1937.
- R v Bourne [1939] 1 K. B. 687.

### Circumstances where abortion can be carried out legally

- Any act which is done, in good faith and without negligence, for the purpose of medical or surgical treatment of a pregnant woman is justifiable even if it causes or is intended to cause an abortion.

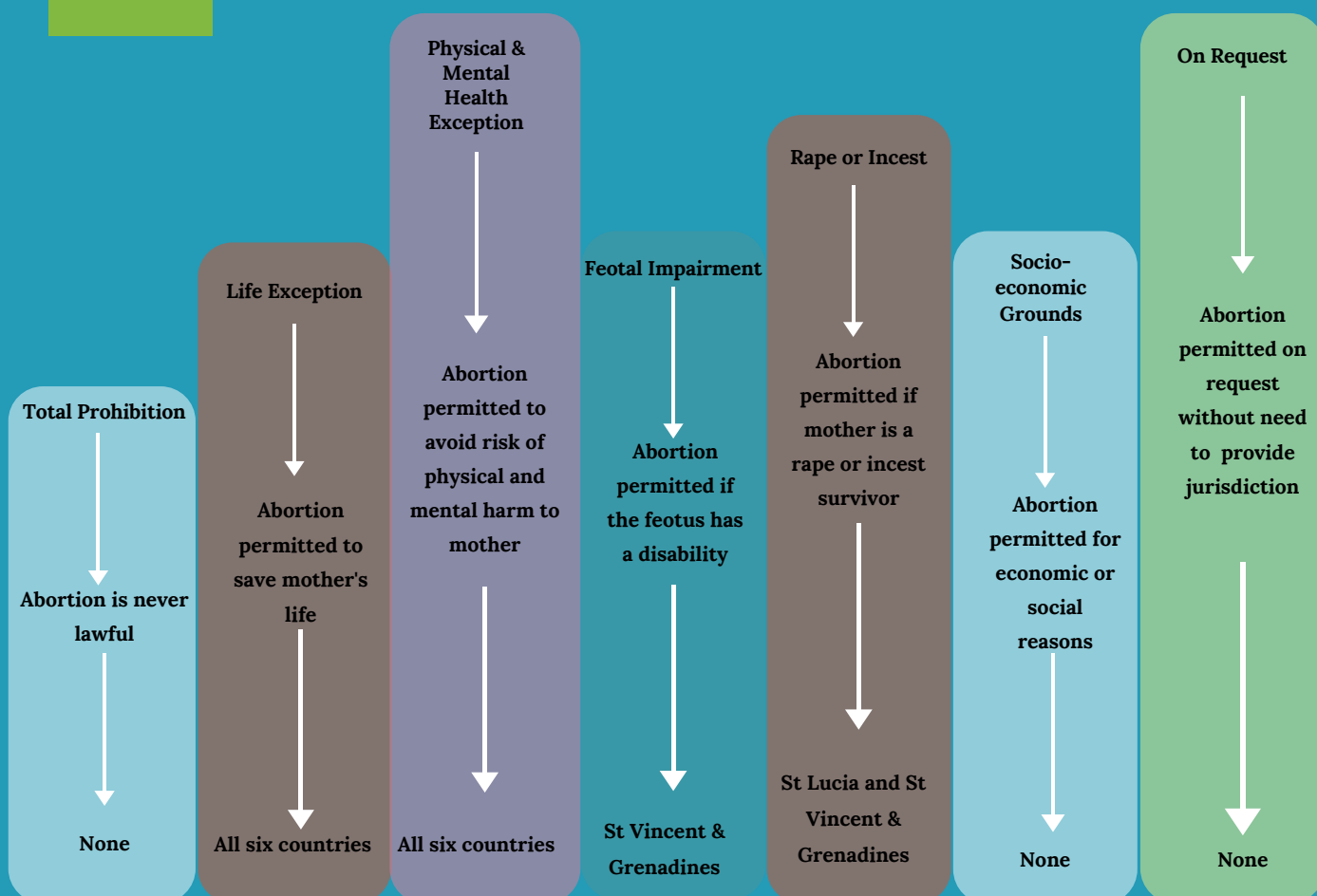
- To save the life of the woman, which includes the preservation of physical and mental health.

# TABLE 1

	ST LUCIA	ST VINCENT AND THE GRENADINES
<b>Laws Criminalising Abortion</b>	<ul style="list-style-type: none"> <li>Sections 165 of the Revised Criminal Code of 2004.</li> </ul>	<ul style="list-style-type: none"> <li>Sections 149(1) -151 of the Criminal Code: Act no. 23 of 1988.</li> </ul>
<b>Who can face criminal sanctions</b>	<ul style="list-style-type: none"> <li>Anyone (the pregnant woman and any other person) who causes an abortion.</li> <li>Anyone who causes the premature delivery of a child for the purpose of hastening the child's death.</li> </ul>	<ul style="list-style-type: none"> <li>The pregnant woman who attempts to or causes an abortion.</li> <li>Anyone who attempts to or causes an abortion.</li> <li>Anyone who knowingly supplies or procures any item to be used in carrying out an abortion or uses any force to carry out an abortion.</li> </ul>
<b>Type of criminal sanctions imposed if found guilty</b>	<ul style="list-style-type: none"> <li>7 years imprisonment</li> <li>7 years imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>7 years imprisonment</li> <li>7 years imprisonment</li> <li>5 years imprisonment</li> </ul>
<b>Laws Creating Exception to Criminalisation</b>	<ul style="list-style-type: none"> <li>Sections 166 of the Revised Criminal Code of 2004.</li> </ul>	<ul style="list-style-type: none"> <li>Sections 149(2) – (4) of the Criminal Code: Act no. 23 of 1988</li> </ul>
<b>Circumstances where abortion can be carried out legally</b>	<ul style="list-style-type: none"> <li>Two medical practitioners need to confirm that (a) it is necessary to save the woman's life (b) it will preserve her physical and mental health or (c) the pregnancy is the result of rape or incest.</li> <li>The pregnancy should not exceed 12 weeks and should be done at an authorised institution.</li> <li>If the abortion is immediately necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health, the limits as it relates to length of pregnancy and the need to have two medical practitioners confirm the need for the abortion, do not apply.</li> </ul>	<ul style="list-style-type: none"> <li>To be completed in authorised facility and two medical practitioners need to confirm that (a) it is necessary to save the woman's life ; (b) it will preserve her physical and mental health or that of any existing child ; or (c) substantial risk that, if the child were born, it would suffer from such physical or mental abnormality.</li> <li>If completed in authorised facility, abortion is allowed in cases of rape or incest.</li> <li>If the abortion is immediately necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health, the limits, as it relates to authorised facility and the need to have two medical practitioners confirm the need for the abortion, do not apply.</li> </ul>

The laws on abortion in the 6 OECS countries are all adopted from and influenced by a British colonial era law titled the Offences Against the Person Act, 1861. Some of the countries like Antigua and Barbuda, St Kitts and Nevis and Dominica have maintained the colonial era law without changes. Whilst St Lucia, St Vincent and the Grenadines and Grenada made changes to their laws, the ethos of the colonial era law remains.

FIGURE 1



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## III. International Obligations of 6 OECS Countries and Access to Safe Abortion Services

While there are no international treaties that give express protection to the right to access an abortion, various international treaties such as Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain rights under which access to an abortion is protected. For example, the right to reproductive and sexual health under article 12 of CEDAW guarantees a woman's right to access an abortion. Further, denial of an abortion in cases of rape or incest is a breach of article 7 (freedom from cruel and inhuman treatment) of the ICCPR.

Having ratified CEDAW and other treaties dealing with gender equality and fundamental human rights, the member countries of the OECS have a duty to protect the rights of women and girls. For example, in article 2, CEDAW requires states to take measures to eliminate discrimination against women and girls.

**This means that OECS countries have a legal obligation to remove all impediments, which bar women and girls from equal access to reproductive health services such as an abortion.**

Article 2 also places a positive obligation on states to put in places procedures and guidelines which will facilitate women and girls accessing these services. The expansion of the rights under CEDAW, ICCPR and other treaties to include access to abortion is largely the work of the monitoring and tribunal bodies set up to provide interpretive guidance on treaty rights. These interpretations have taken the form of Concluding Observations, General Comments and General Recommendations. The guidance from these instruments enumerates the scope or nature of the state's obligations under the respective treaties.

The states therefore have an obligation to ensure their domestic laws are in line with the obligations created by the interpretations from these human rights bodies. Even where the countries in the OECS have not incorporated the treaties into domestic law, national courts are obliged to apply national laws in a manner that is faithful to the countries' international commitments.

**It therefore means that national abortion laws must be aligned to the countries' international obligations.**

This has not been the situation for most of the Caribbean.

TABLE 2

TREATY/CONVENTION	PURPOSE	PROTECTION OF RIGHTS RELEVANT TO ABORTION
Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)	CEDAW is the main convention on gender equality. This Convention was adopted by the UN General Assembly in 1979 and is regarded as an international bill of rights for women.	Right to reproductive and sexual health (article 12)
International Covenant on Economic, Social and Cultural Rights (ICESCR)	The ICESCR was adopted by the United Nations General Assembly in 1966 and is the main convention on economic and social rights.	Right to health (article 12(1))
International Covenant on Civil and Political Rights (ICCPR)	The ICCPR is considered the main convention for promoting civil and political rights. This Covenant was adopted in 1966 by the UN General Assembly	Right to privacy (article 17), Right to equality/non-discriminations (article 2 and 3) Right to life (article 6) Freedom from cruel and inhuman treatment (article 7)
Convention on the Right of the Child (CRC)	Human Rights treaty which sets out the civil, political, economic, social health and cultural rights of children. Adopted in 1989.	Right to access healthcare services including reproductive and sexual health services (Article 24)
Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belem do Para)	This Convention was adopted in 1995, and regulates the prevention, punishment and eradication of violence against women	Right to enjoy all the political, social and economic rights embodied in international treaties including the ICCPR and the ICESCR (articles 4 and 5)
American Convention on Human Rights	This convention was adopted in 1978 and is the human rights treaty signed by all countries in the Western Hemisphere	Right to life (article 4), Freedom from cruel and inhuman treatment (article 5), Right to equal protection before the law (article 24), Right to privacy (article 11)

## IV. International Jurisprudence on Access to Abortion

There have been significant developments in international human rights norms related to the denial of abortion services as a human rights violation. Starting with the 1994 International Conference on Population and Development (ICPD) Programme of Action and the Beijing Platform for Action, international consensus began to acknowledge “reproductive rights as human rights that are already enshrined in domestic and international law” and called on “governments to strengthen their commitment to women’s health by addressing unsafe abortion” as well as access to abortion services.

Most recently, international and regional human rights bodies have, through the decisions of tribunals, general recommendations, general comments and concluding observations, established that “when abortion is legal under domestic law, it must be accessible in practice, and that denials of access to legal abortion services can amount to violations of the rights to health, privacy, non discrimination, and freedom from cruel, inhuman, and degrading treatment”[6].

International human rights jurisprudence expressly recognises that access to abortion is a human rights issue not only for women but also girls. In General Comment 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child, the Committee on the Convention of the Rights of the Child (CRC)

encouraged countries to “develop and implement programmes that provide access to sexual and reproductive health services, including family planning, contraception and safe abortion services”.

According to jurisprudence from the United Nations, countries must first guarantee women’s and girls’ access to abortion by removing penal laws that criminalise women and girls for having an abortion and healthcare providers for offering abortion services. The Committee on the Elimination of All Discrimination Against Women (CEDAW) states that

**criminalisation of medical services that only women use or need, including abortion, amounts to discrimination based on gender and is a barrier to women’s access to health services.**

Criminalisation is therefore a breach of women’s and girls’ rights to equality and health. The Human Rights Committee (HRC) has also expressed strong concerns about the practice of imposing criminal punishment on healthcare providers, who offer abortion services[7]. It is now recognised in the international sphere that countries have a duty to ensure access to an abortion if pregnancy is either a threat to the woman’s or girl’s life/health or the result of rape or incest. Life or health in these circumstances is interpreted broadly to include the mental health of the woman or girl.



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In *KL v Peru*,<sup>[8]</sup> the HRC found that the complainant should not have been denied access to abortion in a situation where it was known that the child's death after birth would have caused the woman severe mental distress. The HRC has also stipulated that the existence of abortion services in cases of rape or incest is a critical part of a country's fulfilment of its obligations under articles 7 (cruel, inhuman and degrading treatment) and 24 (protection of minors) of the ICCPR. In *V.D.A. v. Argentina*<sup>[9]</sup> the tribunal found that forcing an adolescent to continue with a pregnancy, which resulted from sexual violence, amounted to cruel and inhuman treatment.

The HRC and other international tribunals have acknowledged the need for countries to not only provide access to abortion services but to also guarantee that these services, including post-care abortion, are safe, easily accessible, affordable and of good quality. In assessing a Zambian abortion law, the HRC, observed that though the law on its face appeared liberal, the requirement that three physicians must consent to an abortion constituted a significant obstacle for women wishing to access abortion services. This requirement was especially onerous in a developing world context with a large percentage of poor women and shortage of doctors<sup>[10]</sup>.

The decision of the European Court of Human Rights (ECHR) in *Tysiak v Poland*<sup>[11]</sup> is particularly instructive. In this case the ECHR established that a country had a positive obligation under article 8 (right to privacy) of the European Convention of Human Rights to

not only legislate access to abortion but to put in place procedures and institutions that will allow a woman to easily access these services.

The CEDAW and CRC Committees have also called on countries to remove institutional and procedural barriers, which prevent women and girls from accessing abortion services. CEDAW Committee has made it clear that conscientious objections from healthcare providers should not be allowed to prevent access to these services especially in legal regimes where third party authorisation (doctors etc) is required<sup>[12]</sup>. The CRC has also asked countries to ensure that "adolescents are not deprived of any sexual and reproductive health information or services due to providers' conscientious objections"<sup>[13]</sup> or by demanding that they seek consent from parents or guardian.

Jurisprudence from international tribunals have also provided clarity to two of the most vexing issues related to the right of women and girls to access an abortion: rights of the unborn foetus and the man who impregnated the woman. As an answer to the former, the ECHR in *Panton v United Kingdom*<sup>[14]</sup> established that having an abortion is compatible with article 2 of the European Convention on Human Rights and a claim that a foetus has a fundamental right to life cannot trump the right of a woman to have an abortion under the specified circumstances outlined in law. Additionally, in *Baby Boy*<sup>[15]</sup>, the American Convention on Human Rights Commission, found that even though the American Convention recognise the right to life from conception, this right was not absolute - abortion constituted a justifiable exception to this right.

As regards the right of the man, the ECHR in *Pantano* categorically found that the decision to terminate is for the woman alone. Husbands, boyfriends or partners do not have a legal right to either be consulted or to be given a veto vote.

Guidance on gestational time limits and timely abortion services receives some but not comprehensive attention in international human rights law. However, WHO views limits on when a woman or girl can obtain an abortion as a barrier to access, which implicates the woman's or girl's human rights[16].

**FIGURE 2**

**Criminalisation of women and girls and healthcare providers who carry out abortions**

Criminalising a reproductive service that only women need amounts to a breach of the right to equality or non-discrimination on the grounds of sex or gender

**Abortion not available for rape or incest or in case of foetal impairment**

This is a breach of the right to privacy and amounts to cruel and inhumane treatment

**Policies and procedures which are barriers to accessing safe, affordable, and lawful abortion**

States have a positive obligation under the rights to privacy to not only legislate access but to also put in place procedures to guarantee safe, timely, and readily available and affordable abortion services

**Girls' access to abortion**

The Convention on the Rights of the Child guarantees girls to the right to also access safe abortion services as part of the right to reproductive and sexual health right

**The unborn and the man who impregnated the woman**

- Abortion is a justifiable exception to the right to life and is therefore compatible with the right to life.
- Any rights allowed to the unborn cannot be allowed to trump the right of a woman to a lawful abortion.
- A woman's rights to privacy is undermined by allowing the man who impregnated the woman to be consulted or given a veto vote.

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# V. Impact of National Legislation on the Rights of Women and Girls in the OECS

**In all six OECS countries abortion is criminalised except in limited circumstances.**

Healthcare providers who facilitate abortions and women and girls who undergo or even attempt to have an abortion face stiff criminal penalties. In some countries like Antigua and Barbuda, Dominica and St Kitts and Nevis women, girls and their healthcare providers who carry out abortions after 28 weeks can face up to life imprisonment under child destruction charges. Criminalising women and girls who attempt to or complete an abortion is an infringement of their rights to equality, privacy and reproductive and sexual health. The fact that there are limited exceptions does not negate the infringement since these circumstances do not reflect the full range of reasons influencing a woman's or girl's decision to terminate a pregnancy.

Currently, all six countries allow abortion in cases where it will save the woman's life and preserve her physical and mental health.

**Only St Lucia and St Vincent and the Grenadines allow for an abortion in the cases of rape or incest.**

St Vincent also allows for the procedure in cases of foetal impairment.

However, these circumstances do not capture the full spectrum of reasons a woman might need to have an abortion. In a good number of cases, women and girls choose to have an abortion for economic reasons or for the mere fact that she does not want to become a parent. It therefore means that the laws in the countries fail to allow these women to lawfully exercise control over their reproductive function.

**Instead women and girls are forced to become criminals in order to exercise a fundamental right to bodily autonomy.**

The laws in these countries place gestational limits on when a pregnancy can be terminated. In Dominica, St Kitts and Nevis and Antigua and Barbuda the cut-off time can be interpreted as 28 weeks. The laws in the three countries do not expressly state that abortions should not be performed after 28 weeks but the terms of the Preservation of the Life of the Infant (PLI) Act lead to this conclusion. The PLI Act deems the termination of a pregnancy after 28 weeks child destruction and as indicated before, the penalty for this is life imprisonment. As such, in practice healthcare providers have taken 28 weeks as the cut-off point and usually refuse to carry out abortions beyond this threshold. In St Lucia the window period to access a legal abortion is expressly stated in the law but gestational time limit is set much lower at 12 weeks.

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A woman or girl in St Lucia can only access a late term abortion if it is necessary to “save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health”. And even though neither St Vincent nor Grenada has any specific laws which prescribe the gestational limits, it is keeping with international trends for them to have gestational restrictions set out at the policy or implementation level.

Restrictions on the time within which a pregnancy can be lawfully terminated serves to balance the competing interests of the life of the unborn on the one hand and the bodily autonomy and health of the mother on the other. It is however a delicate balance and one which must be predicated on certainty as to when a foetus could be considered ‘viable enough’ to deny the woman the right to terminate an unwanted pregnancy. However, Erdman[17] argues that “measurements of gestational age are at best professional estimates, and are routinely off by one or two weeks, especially later in pregnancy.” The law therefore leaves this determination to the discretion of doctors, resulting in arbitrary application of the law that affects women’s and girls’ access to abortion especially in later stages of their pregnancy.

Unlike Antigua and Barbuda, St Kitts and Nevis, Dominica and Grenada, the laws in St Lucia and St Vincent and Grenadines give some guidelines on how abortions are to be carried out. However, these guidelines while well intentioned can have a chilling effect on women’s and girls’ access to abortion services. For example, women and girls in both countries need to have two medical doctors confirming the need for the

abortion, which must be done in an authorised facility. These two restrictions can affect women’s and girls’ ability to access affordable and timely services in a couple of ways.

First, it is an onerous burden to ask women and girls, especially those from lower socio-economic circumstances to get the authorisation from two doctors, who in most cases are private doctors and will require payment for these services. Secondly, doctors sometime have difference of opinions, what happens to the woman or girl if the doctors cannot agree or worse, yet the doctors refuse to authorise the abortion because of their religious beliefs? The laws fail to provide guidance on how these issues ought to be resolved and therefore they can potentially severely impact practical access to abortion services. Third, while the idea of having authorised facilities for abortion services might sound good, in practice it can deter women from seeking abortion services in these regulated facilities.

In studies done in Guyana, Anguilla and St Martin[18], which have legislation for authorised facilities, it was found that women were reluctant to use these recognised facilities. Even though abortion is offered, there is still a lot of stigma and religious condemnation for women and girls who have abortions in these small societies. Going to an authorised facility serves to broadcast your ‘shame’ to the entire community. To avoid the scorn, women and girls, who can gather the funds, will opt to get the abortion done at a private doctor or travel to a nearby country. In both the countries with and without legal guidelines on abortion procedure, healthcare

providers are given enormous power to decide women's and girls' reproductive fates. Yet there is little accountability for how they exercise their wide discretion. A study done in Antigua and Barbuda and St Kitts and Nevis, found that healthcare providers were sceptical about reforming the laws because in their opinion the system of performing illegal abortions (those done not to save the woman's life and preserve health) was working for everyone[19]. In their estimation a legal regime would reduce access.

**However, as the study's authors noted, medical practitioners had the liberty to practice illegal abortions, but women had no legal right to those services.**

In highly restrictive legal environments like St Kitts and Nevis and Antigua and Barbuda, it was the doctor who personally decided whether to serve any particular woman. If medical practitioners refuse to provide the service, perform the procedure badly, prescribe the wrong medication or do not provide proper post-abortion care, the woman or girl has no recourse. In countries like St Lucia and St Vincent and the Grenadines, where the law expressly states that is medical practitioners who must perform the abortion, the laws fail to account for doctors who might have objections to performing abortions. Caribbean society is known for its conservative Christian beliefs and it is not farfetched to envision doctors having a problem with abortions due to their religious beliefs. In those circumstances, doctors might be inclined to discourage rather than assist women and girls to obtain an abortion.

The legislations in the six countries do not explicitly prohibit adolescent girls from accessing abortion. However, the restrictive nature of these abortion laws,

**the legal age of sexual consent as well as cultural norms about the sexual agency of adolescents' act as significant barriers to the ability of such girls to access safe abortions.**

While there are no current studies from the OECS on adolescents and abortion, findings from studies in other developing countries provide useful insights.

**Adolescents are more likely than older women to seek abortions from untrained providers, self-induce or undertake second-trimester abortions[20].**

All three scenarios pose significant health risk and can in some cases lead to death. During the period 2004-2007, unsafe abortions were the leading cause of maternal death for adolescents.[21] Stigma, shame and the lack of resources are amongst the reasons adolescents cite for preferring to self-induce abortions and failing to seek post-abortion care services. Lack of access to contraceptives due to age of consent laws and the attitudes of healthcare providers; also make abortion the only method available for an adolescent who is unprepared for an unwanted pregnancy. Restrictive abortion laws, which for example require authorization from two medical professionals or demand that abortions be done in an authorized facility, only impede access for adolescents who have been made to feel ashamed about the pregnancy and do not want to compound that shame by including judgmental healthcare providers in the process.

This has meant that adolescents are more likely to resort to using unsupervised medical abortions, such as Cytotec[22]. In Jamaica for example, Cytotec is illegal but its use is widespread amongst women and adolescent girls.[23]

In countries with highly restrictive abortion laws and high levels of social stigma attached to abortion, it is not only adolescent girls who opt for illegal and unsafe abortions. Women, including migrant women, prefer to self-induce with misoprostol (such as Cytotec). It guarantees anonymity, is cheaper than surgical abortion and can be easily accessed by buying it from the pharmacy or on the black market. For example, one study on Antigua and Barbuda and 3 other eastern Caribbean countries[24], found that among unregistered migrant women, “each of whom had had from one to four misoprostol abortions, there was a consensus that it was best to do your own abortion – despite lots of blood and pain – to avoid the cost and visibility of going to a doctor”. Yet the use of Cytotec in this unregulated environment puts women’s lives at risk. Medical practitioners in the subject countries reported the indiscriminate use of Cytotec (using incorrect doses or too late in the pregnancy), which resulted in women being admitted to the hospitals with incomplete abortions. The same study highlighted that it wasn’t Cytotec but its unsupervised use that was problematic. Unsupervised use will continue if the legal regime, which reinforces existing social disapprobation against abortion, continues to restrict abortion in ways that impede access to safe and affordable abortions.

**Even though the Commonwealth Caribbean, including the OECS countries, experiences high levels of sexual violence perpetrated against women and especially girls, only St Lucia and St Vincent and the Grenadines expressly permit abortion in cases of rape or incest.**

An UNODC study carried out in nine Caribbean countries, including Antigua and Barbuda, Dominica, St Lucia and Grenada, revealed that (a) three of the top ten recorded rape rates in the world occur in the Caribbean and (b) 48 percent of adolescent girls’ sexual initiation was either “forced” or “somewhat forced[25]”. Another study from the Eastern Caribbean also found that transactional sex abuse, primarily involving older men and adolescent girls, was widespread and occurred with little disapproval and the full knowledge of community, parents and law enforcement officials[26]. The UNHRC held that the inability of women and girls subjected to sexual violence to lawfully access an abortion is tantamount to cruel and inhuman treatment[27]. Women’s and girls’ right to not be subjected to cruel and inhuman treatment is protected in the constitution of all 6 OECS countries.

**It is therefore a breach of women’s and girls’ constitutional rights to not have access to safe and affordable abortion when they have been the victims of sexual violence.**

While St Lucia’s legislation allows for women to carry out an abortion without the need to notify or gain the consent of her partner, it restricts women’s and girls’ access to abortion by demanding a police report to prove the rape or incest.

These additional requirements are designed to make it harder rather than easier for women and girls to access an abortion. For example, in the case of incest or rape many women never report or are reluctant to report because the perpetrator is usually a close family member or acquaintance. If a woman or girl is uncomfortable with reporting, she should not be forced to do so in order to access an essential reproductive and sexual health service. In addition, the report must show that an investigation is underway. However, there are many cases of police failing to investigate cases of rape or incest not because the assault did not occur but because the police did not believe the survivor. Should survivors be denied access to an abortion in those circumstances? While it is understandable that the healthcare provider will need some verification that the rape or incest did occur, a police report does not increase the woman's veracity since most rapes or incest cases are never reported.

**The lack of recognition of the rights of lesbian and bisexual women and girls to have an abortion impacts their ability to access these critical reproductive services.**

Ruthann Robson argues that the “reproductive right of access to abortion...is generally construed as the right of heterosexually active women to terminate unwanted pregnancies [28]” and as such the needs of lesbian and bisexual women and girls become invisible in the discourse surrounding access to abortion. However, she contends that lesbian and bisexual women, by virtue of having the capability to become pregnant, have “a specific stake in access to abortion.”

Lesbian and bisexual women face a high risk of sexual assault, including corrective rape, which can result in an unintended pregnancy. There are no studies in the OECS on the prevalence of unwanted pregnancy among lesbian and bisexual girls but studies in other countries show that the rate of unwanted pregnancies is much higher among lesbian and bisexual adolescents than their heterosexual peers[29]. It is therefore clear that that access to abortion services is also a need for lesbian and bisexual women and girls. Access to abortion services in the OECS can become even more restrictive for lesbian women and girls who face discrimination due to their sexual orientation. Social stigma and religious opposition, which have also precluded liberalisation of abortion laws in the OECS, are major drivers of the persistent discrimination meted out to lesbian and bisexual women.

**While the OECS's abortion laws on their face appear to apply to all women and girls, the laws' discriminatory effect is compounded by the existence of widespread societal discrimination against same sex relationships.**

Adolescent who are lesbian and bisexual can be more reluctant to engage with the formal health systems due to the prejudices and biases of healthcare providers. Abortion laws which require parental consent are also restrictive for adolescents with parents/guardians who are not only hostile to the adolescent getting an abortion but to the adolescent's sexuality as well [30]. Robson also notes that restrictive access or complete prohibition against late term abortions has a significant impact on lesbian women, who are more likely to only realise that they are pregnant late in the gestation process.

# VI. Comparative Legal Regime on Abortion in Guyana and Barbados

Barbados and Guyana have the most liberal abortion laws in the English-Speaking Caribbean. The diagrams below give a summary of the key features of the Guyana and Barbados legislation.

**FIGURE 3**





FIGURE 4

### Penalties

There penalties associated with breaches of the act but these are not severe and do not place any criminal liability on the pregnant woman or girl. However, healthcare providers can be held liable for not obtaining the requisite consent from the pregnant woman or for performing an abortion for a 12 weeks or older pregnancy in an unauthorised facility.

### Gestational Limits and Medical Authorisation

- There are no limits on when an abortion can be done but abortions will require authorisation from a medical doctor at different stages of the pregnancy.
- 13 to 19 weeks requires two medical doctors.
- 20 weeks and beyond requires 3 medical doctors.

### Reasons For Abortion

- Below 12 weeks the justifications found in the OESC will suffice. Threat to health include socio-economic grounds and rape or incest. Survivor only needs to provide written statement in case of rape or incest.
- Between 12 and 19 weeks only to save the woman's or there is a threat to woman's health or in cases of foetal impairment.
- Beyond 20 weeks only to save the woman's life or there is a grave threat to woman's health or the life of the foetus.

### Authorised Facility

- Abortions must be completed in an approved facility except where the pregnancy is less than 12 weeks or if it poses a grave threat to the mother's life or health.

### Access For Girls

- Adolescent girls under 16 must get consent from parents or guardian.
- It is assumed that those over the age of 16 do not need parental consent.

### Counselling

- The Act leaves it to the discretion of the Minister to make regulations governing the provision of counselling for the pregnant woman or girl.

### Montoring

- The Act leaves it to the discretion of the Minister to make regulations on reporting requirements for medical practitioners.

In comparison to the abortion laws in the 6 OECS countries, the legislations in Barbados and Guyana are progressive in a few ways. First, they have a legal regime for abortion that is separate but connected to the main criminal law statutes laws. Second, both countries increased the number of justifications a woman can use to obtain an abortion, with Guyana having the most liberal policy in this regard. Third, there are no gestational limits on when an abortion can be performed. Fourth, there is explicit recognition of the rights of adolescent girls to obtain access to an abortion. And fifth, the Barbados legislation does not place any criminal responsibility on women and girls for any breach of the Act.

Nonetheless, the legislation in both countries contain provisions which can serve to unnecessarily restrict women's and girls' access to an abortion.

For example, (a) some abortions have to be done in authorised facilities, (b) permission from two or more medical practitioners is still needed under certain circumstances, (c) girls under 16 in Barbados need the permission of parents or guardians to obtain an abortion, (d) the reasons for obtaining an abortion are still too restricted if judged against jurisdictions where abortion is provided on request, and (e) the Barbados legislation should have included more details on the provision of counselling and monitoring of abortions rather than leaving it up to the discretion of the Minister to develop regulations. While there is room for improvement in the legislative framework, there are certain features of the laws that could be adopted to the OECS context. These features are discussed further in the recommendation section of this paper.



## VII. Recommendations for Law Reform in the 6 OECS Countries

### A. Laws should make abortion available without legal restrictions on the reason for having the abortion.

Proponents against this position caution that this will lead to an upsurge in abortions and ultimately threaten societies' ability to regenerate itself. This argument is unfounded. In Canada where abortion is available without restrictions on the reasons, abortion rates have remained constant[31]. Furthermore, studies have shown that the type of legal regime (restrictive or liberal) does not affect the abortion rates[32]. Women and girls will find means to procure an abortion whether the law deems their reasons for doing so as lawful.

**B.** The real benefit of having a liberal regime is that it prevents women and girls from having to engage in clandestine abortion practices. "The more restrictive the legal setting, the higher the proportion of abortions that are least safe—ranging from less than 1% in the least-restrictive countries to 31% in the most-restrictive countries." Unsafe abortions significantly increase the risk of abortion-related complications, which can lead to infertility and death. As an example, Canada, with its liberal regime, has one of the lowest rates of abortion-related complications and maternal mortality in the industrialised

world[33]. Similarly, 10 years after Barbados liberalised its laws, septic abortions declined by 70% and the admissions for complications of abortion fell by 53 percent [34]. Guyana also experienced dramatic fall in its admissions for complications of abortion. It fell by 41 % after 6 months of the law being enacted [35].

### C. The law should refrain from setting gestational time limits and should instead leave this decision up to the woman or girl and her healthcare provider.

Advocates for the life of the unborn would argue that this will lead to greater number of later term abortions, which would violate the rights of the unborn. However, there is no evidence to support this concern. In Canada, where the law does not prescribe gestational time limits, the decision as to what stage the pregnancy can be terminated is left up to the woman and her medical practitioner. Statistics from Canada illustrate that 90% of abortions are performed within 12 weeks gestation and 96% within 20 weeks gestation[36]. It therefore demonstrates that late terms abortions will not increase if the decision is left to the woman or girl and her doctor.

**D. While there is no need to set absolute time limits on abortions, it might be necessary for the woman to seek medical authorisation for later term abortions.**

The fervour of religious opposition to reforming abortion laws can never be underestimated. Their concerns about the life of the unborn and the need for the state to act positively in protecting this interest must be taken seriously. As such, the more liberal Canadian approach might not get support but either the Barbados or Guyana position might be favourable. The positions in both countries try to balance the interests of religious advocates who insist that the unborn has rights with the interest of women and girls to have the state provide access to essential reproductive and health services. As such, as the pregnancy matures, the law places greater restrictions on the circumstances in which a woman can receive an abortion. For example, in Guyana, an abortion can be done on request up to 8 weeks but between 12 and 16 weeks there must be a justification and beyond 16 weeks 3 medical practitioners must authorise the abortion. It might be argued that the greater restrictions on later term pregnancies not only protect the rights of the unborn but also the health of the women since late term abortions can have medical consequences. However, as the example of Canada suggest you do not need laws making these stipulations to either encourage earlier term abortions or protect the woman's health. Nonetheless putting these stipulations in law might be necessary to appease the opposition to abortion laws.

**E. There should be no designated facilities to perform abortions. Instead the law should stipulate that a woman or girl should be able to access an abortion at any private or public facility and these services should be covered under health insurance.**

One of the clear conclusions from the studies on abortions in the Caribbean is that the social stigma surrounding abortions deters women and girls from using designated facilities[37]. Rather than relying on authorised facilities, the government should issue abortion directives/guidelines, which all providers are expected to comply with. It also emerged in one of the studies that abortion services, including post-care services, were not covered by health insurance. This meant that doctors had to mischaracterise an abortion as either 'stomach pain' or a 'miscarriage' to facilitate women receiving reimbursements from their insurance companies[38]. The lack of insurance coverage increases the cost of an abortion and is an additional barrier to access.

**F. The law should recognise that the decision to terminate a pregnancy should belong to the woman in consultation with her healthcare provider.**

**To give practical effect to this recognition, women and girls seeking an abortion should not have to get permission from more than one medical practitioner.**

Requiring women to seek authorisation from two or more medical doctors is a significant barrier to access for women and girls. In Canada the decision to terminate is made between the woman and her doctor

while Guyana adopted a middle ground position in which two or more doctors are needed for pregnancies over 12 weeks.

**G. While the law can acknowledge the right of healthcare providers to refuse to perform an abortion (conscientious objections), these healthcare providers should also have a duty to refer the woman or girl to another provider who will perform the service.**

One of the weaknesses of the Guyana and Barbados legislation is that they fail to provide sufficient guidelines on the duties of healthcare providers who object to abortions on religious or other moral grounds. The legislation in Guyana for example makes note of the right of these persons to refuse to perform, participate or facilitate an abortion. The legalisation makes it clear that objections cannot be used where the abortion is necessary to save the life of the mother or prevent grave injury. However, it does not indicate what their other corresponding duties are in relation to guaranteeing a woman's or girl's right to access an abortion. For example, it would have been useful and keeping with international standards for the law to require healthcare workers to refer the woman or girl to another provider if they are unwilling to provide the service.

**H. Abortion should be governed by a separate legal regime that is divorced from the current criminal law.**

The current criminal law framework is unsatisfactory for a couple of reasons. First, it is not enforced and therefore ineffective as a deterrent tool. Evidence shows that abortions are widespread despite the legal restrictions. The continuing criminalisation in face of the impunity with which the law is broken diminishes respect for the criminal law. Second, it forces women, girls and their healthcare providers to operate as criminals in accessing and providing what is deemed an essential reproductive service. Third, the criminal law reinforces social stigma on abortions and is a hindrance in tackling this social disapprobation. Stigma by itself is a barrier to access and creating incremental exceptions to the criminal sanctions does not send a strong enough message to break the social stigma. Fourth, the abortion laws are archaic and obsolete. The laws were adopted from British colonial era and even where the laws have been updated, they still maintain the language from the colonial period. Both Guyana and Barbados have separate legal regime, which contain penalties for specific breaches of the law.

**I. The law should make express provision for adolescent girls to have access to an abortion.**

Minor girls are most at risk when it comes to having unsafe abortions in legal regimes where abortion services are highly restrictive. Additionally, women's assumed caregiving role as well as a greater physical burden of pregnancy on young girl's body means an unplanned pregnancy can have serious consequences for her ability to

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finish school, attain higher education and gain employment. Given the conflicting opinions about adolescent sexuality in the Caribbean, the law needs to make it explicitly clear for healthcare providers that girls should be allowed access to an abortion. The Barbados approach could be taken where girls under the age of consent need permission from their parent or guardian but those above the age of consent should be able to access the service without the need for parental intervention. However, the approach taken in Guyana is the better practice. It places no obligation on the healthcare provider to obtain the consent of a parent or guardian to terminate the pregnancy for a child. Child being anyone under the age of 18.

**J. It should be mandated that health institutions be given the necessary resources to provide and monitor abortions services.**

Research done in Guyana in 2012[39] showed that after 17 years of having passed a liberal abortion law, women's and girls' access to safe abortions was still restricted. This was due largely to lack of political will, which led to government's failure to provide the health sector with the necessary resources to implement the law. A stark result of the government's failure was the death of an 18-year-old woman due to a botched abortion done in a doctor's private clinic[40].

## VIII. Conclusion

The current legal regime on abortion is wholly inadequate in safeguarding the rights of all women and girls, including lesbians and bisexuals, to have access to safe and affordable means of terminating an unwanted pregnancy.

**The OECS' colonial era abortion laws violate current constitutional protection and international recognition of women's and girls' rights to equality, privacy and reproductive and sexual health.**

The laws breach these rights by perpetuating sexist ideologies regarding the ability of women to control their bodies, forcing women and girls to engage in clandestine and unsafe abortion practices that pose a significant threat to their health and reinforcing the disadvantages and discrimination women and girls encounter as result of their age, sexual orientation and socio-economic position. Liberalising abortion laws in the OECS is therefore an imperative to achieving gender equality and protecting women's and girls' right to equal citizenship, privacy, bodily autonomy and health. To achieve this, the 6 OECS must incorporate the following into their legal regimes for abortion:

- a. Abortions should be made available to all women and girls, in all their sexual diversities, without legal restrictions on the reasons for having the abortion.
- b. The law should refrain from setting gestational time limits and should instead leave this decision up to the woman or girl and her healthcare provider.
- c. Women and girls should be able to terminate pregnancies below 12 weeks without the need for permission from a medical doctor.
- d. Provisions can be made for women and girls to seek medical authorisation for late term pregnancies.
- e. The law should stipulate that a woman or girl should be able to access an abortion at any private or public facility and these services should be covered under health insurance.
- f. While the law can acknowledge the right of healthcare providers to refuse to perform an abortion (conscientious objections), these healthcare providers should also have a duty to refer the woman or girl to another provider who will perform the service.
- g. Abortion should be governed by a separate legal regime that is divorced from the current criminal law.
- h. The law should make express provision for adolescent girls to have access to an abortion, without the need for consent from parent or guardian.
- i. It should be mandated that health institutions be given the necessary resources to provide and monitor abortions services.

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