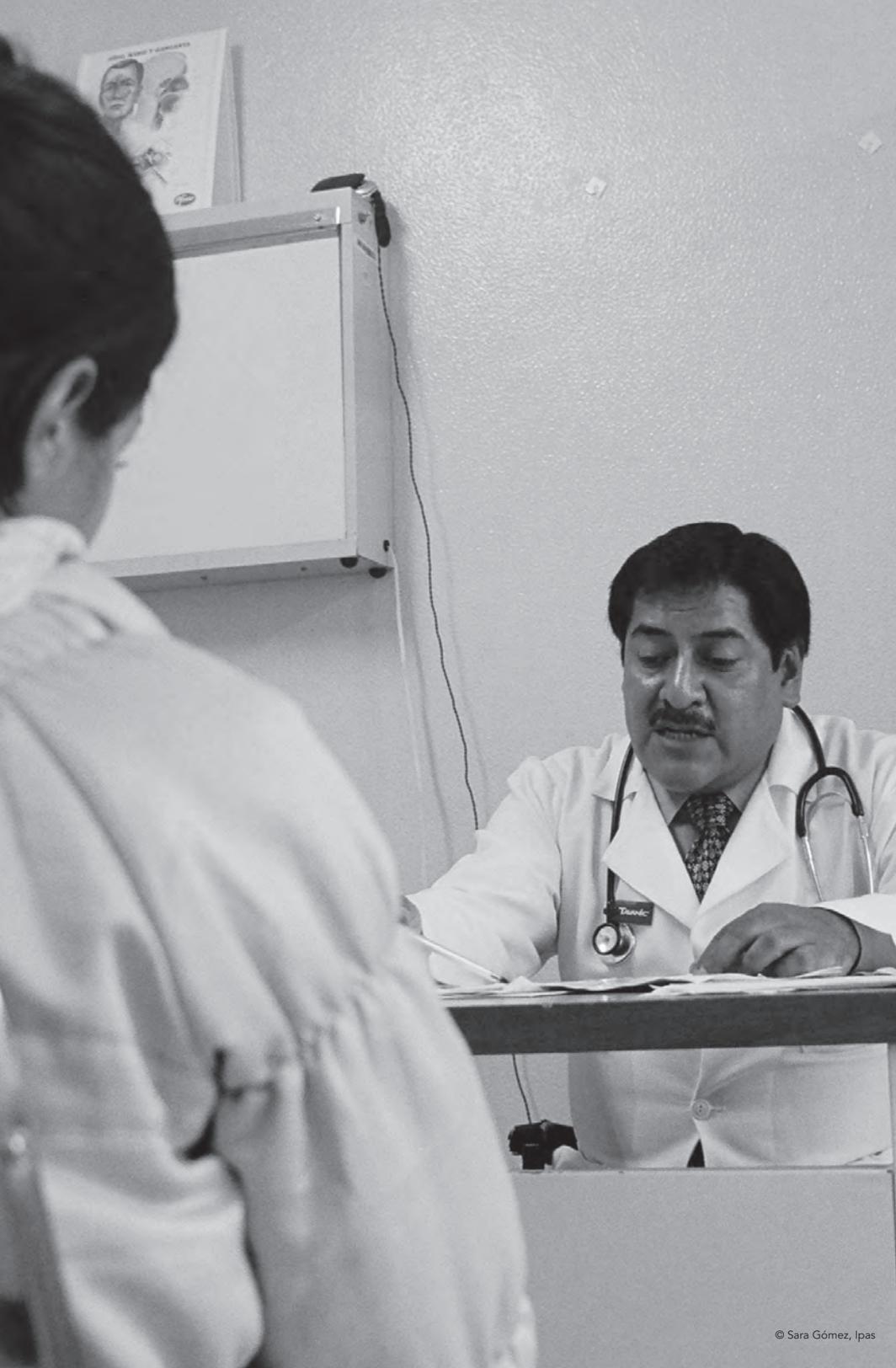


Betraying women: Provider duty to report



Legal and human rights implications for
reproductive health care in Latin America





Medical ethics has historically supported professional secrecy; indeed, it is a cornerstone of the Hippocratic Oath (*I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know*). This basic medical standard has been adopted by the World Health Organization (WHO), the United Nations' coordinating authority on international health. To protect patients' human rights and adhere to medical ethics standards, most countries have laws that prohibit medical providers from breaching patients' confidentiality.

However, the longstanding provider-patient confidentiality relationship is quietly eroding as an alarming number of medical staff across Latin America are reporting women and girls to the police for having abortions. Many countries now require, protect or encourage medical providers to breach their confidentiality duties when they treat women seeking postabortion care.

Health-care providers are often in the difficult position of choosing between the obligation to protect patient confidentiality and the obligation to obey government guidelines, regulations or laws that require them to report suspected abortions. A breach of confidentiality can turn a life-saving hospital visit for care after an unsafe abortion into the preliminary stage of a police investigation. This in turn can lead to arrest, detention, prosecution and even jail time. By abnegating their responsibility to protect the confidentiality of their patients, health-care providers in Latin American have become the entry point for women into the criminal justice system. As a result, fear of being reported prevents women and girls from seeking the medical attention they need for life-threatening abortion complications.



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Abortion in Latin America

Abortion is highly restricted and mostly unavailable in many countries across Latin America. Even where laws are less restrictive, women face significant obstacles to accessing safe abortion services. Legal and administrative barriers, unwillingness of health systems to provide care, lack of information, lack of trained providers, age and gender discrimination, requirements for spousal or parental consent, and abortion-related stigma all present impediments to accessing legal abortion.

Women who are poor, indigenous, Afro-descendent, young, from low socio-economic backgrounds, or living in rural places are more likely to encounter barriers. Faced with these challenges, women with unwanted pregnancies often have no other option than to resort to self-inducing or seeking unsafe, clandestine services. Criminal abortion laws are ineffective at preventing abortion, but successful at pushing women to turn to unsafe procedures.

3 WAYS HEALTH-CARE PROVIDERS ARE COMPELLED TO BREACH CONFIDENTIALITY

Latin American countries have different laws governing provider obligations to breach confidentiality on the issue of abortion.

1 Explicit legal duty to breach confidentiality

In countries like Peru, providers are legally required to report a patient suspected of having an abortion to the police or other authorities. Women have been sent to jail based on provider reports to the police following health-care treatment for abortion complications.

2 Legal obligation to disclose under certain circumstances

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

Brazil recently created a Legislative Inquiry Commission to investigate illegal abortions in the state of Rio de Janeiro. The Commission's final report recommended the development of legislation requiring mandatory and immediate communication from health providers to police when women get post-abortion care in public or private health facilities. Providers

would be required to share specific information on the conditions under which the illegal abortion was performed.

In cases like this, a provider can sometimes mitigate the impact on patients' confidentiality by releasing limited information without revealing private health information. Information can include statistics on how many patients presented with postabortion complications, omitting specific information on the circumstances of pregnancy termination, patient names or dates of treatment.

No explicit duty to report

Breaches of confidentiality can occur when health-care providers are unclear about the abortion laws in their country and their corresponding duty to report. In many cases, providers mistakenly believe abortion is illegal and they report women. They may also mistakenly believe that not only must they report, but that failure to do so is a violation that could lead to their own punishment.

Other times, strong religious or moral convictions drive health-care providers to report women voluntarily. They may support anti-abortion laws and will report women for breaking the law, even if there is no legal obligation to do so. Social and cultural pressures may also impact health-care providers, even when they believe they understand the law. The desire to gain the approval of co-workers or hospital administration drives some providers to report women. Others seek to punish women who do not adhere to a strict gender stereotype that dictates women should serve as wives and mothers.

International standards protect confidentiality

The 1948 Universal Declaration of Human Rights recognizes a patient's right to privacy under the right to "inherent dignity," and states such a right is an "equal and unalienable right of all members of the human family." In cases where a health-care professional is required to breach this obligation to the patient due to a greater or equivalent competing duty, then a conflict of duty arises.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has further recognized that a breach of confidentiality, regardless of the reason, has lasting, negative effects on the patient-health professional relationship.

The former UN Special Rapporteur on the Right to Health, in his 2000 report, discussed the right of all individuals to access the highest attainable standard of physical and mental health, and stated that "a lack of confidentiality may deter individuals from seeking advice and treatment, thereby jeopardizing their health and well-being. Thus States are obliged to take effective measures to ensure medical confidentiality and privacy."

The UN Committee on Economic, Social and Cultural Rights established in 2016 that states must not limit or deny anyone access to sexual and reproductive health—including through laws that criminalize sexual and reproductive health services and information.

The Inter-American Commission on Human Rights (IACHR), the regional body responsible for overseeing human rights concerns in the Americas, has established that "the right to access

to and control over personal information is essential in many areas of life and can have a direct impact on the right to privacy, honor, personal identity, property, and accountability in information gathering.” It has also established that confidentiality is a duty of health-care professionals who receive private information in a medical environment. Maintaining the confidentiality of information providers obtain from their patients is of critical interest in sexual and reproductive health.

The Committee Against Torture has classified as torture the denial or delay in providing care, or the practice of providing life-saving medical care for women suffering complications from illegal abortions only on condition that they first provide information on whether they had an abortion.

The World Health Organization’s 2012 *Safe Abortion: Technical and Policy Guidance for Health Systems* set the international standard by reaffirming that “within the framework of national abortion laws, norms and standards should include protections for informed and voluntary decision-making, autonomy in decision-making, non-discrimination, and confidentiality and privacy for all women, including adolescents.”

Impact on providers and women

A breach of confidentiality violates the human rights of both health-care professionals and women and girls. Governments have an obligation to respect, protect and fulfill all individuals’ human rights.

HEALTH-CARE PROFESSIONALS

Health-care providers play an important role in society as human rights defenders. Legal obligations to breach patient

confidentiality degrade the patient-provider relationship and infringe on medical professionals' role as protectors of the human rights of women and girls.

WOMEN AND GIRLS

Violation of human rights: When health-care providers are forced to disclose personal information and medical records of women and girls who are suspected of obtaining illegal abortions, these disclosures violate not only their right to confidentiality and patient privacy, but also their rights to health, life, and freedom from torture. If a woman or girl who needs postabortion care after an illegal abortion is forced to choose between seeking care that may lead to imprisonment (due to the health-care provider's duty to report) or avoiding care (which may lead to permanent injury or death), her rights to life and health are violated.

When health-care providers are forced to disclose personal health information—or mistakenly believe they are forced to disclose—this also violates procedural due process rights.

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

Forced confessions: Women suspected of obtaining illegal abortions have been forced to wait for care until they "confess"

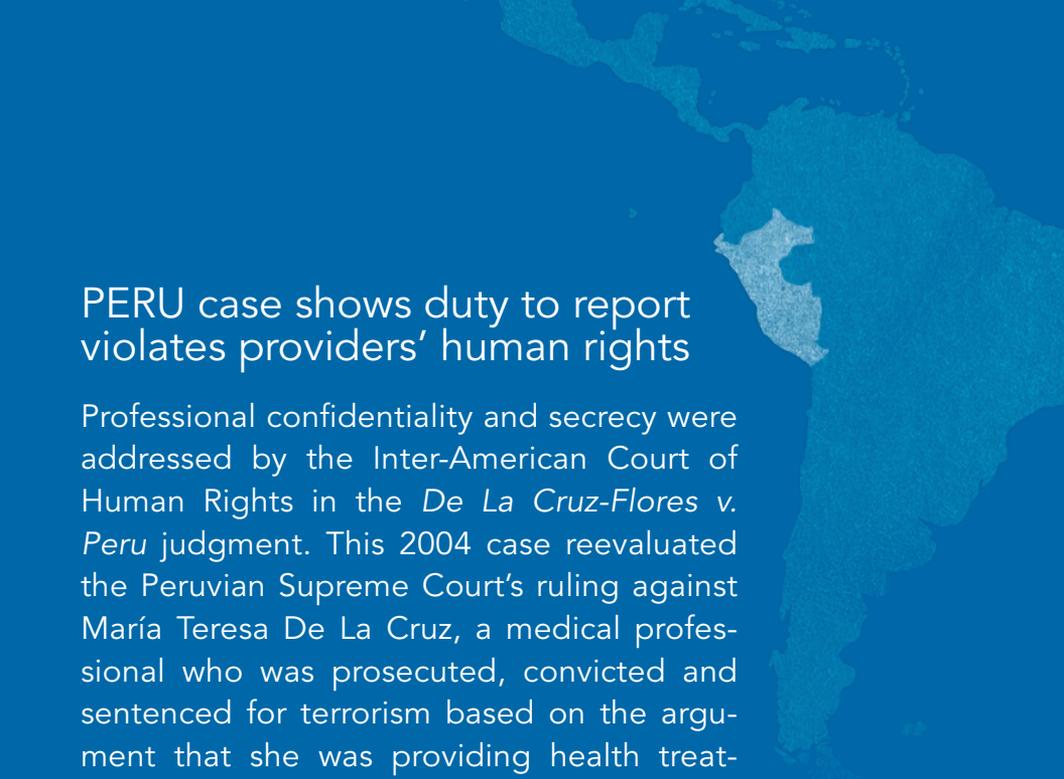
to having an illegal abortion, or until all other patients have been treated before them. Hours of wait time can mean the difference between life and death—or severe injuries to mental and physical health. While the duty of providers is to deliver health care, they instead are forced to act as police officers, investigators and judges, with devastating health effects on women and girls.



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Forcing women to confess to an illegal abortion is a violation of women's and girls' right to remain silent and be free from self-incrimination. Confessions obtained during emergency care should not be considered valid admissible evidence for further prosecution since they were obtained in violation of the right to due process, and disrespect both medical secrecy and a patient's right to privacy.

Extra protection for youth: While adolescent girls are protected under the Universal Declaration of Human Rights, they are also covered by the Convention on the Rights of the Child, which holds states to an even higher standard when dealing with children. If an underage girl is denied medical assistance until she confesses or is forced to wait for treatment, the state is violating its mandate to ensure her best interest, as well as her survival and development. In such a situation, the state is also violating its mandate to protect the child from injury, abuse and negligent treatment while in the care of the hospital.



PERU case shows duty to report violates providers' human rights

Professional confidentiality and secrecy were addressed by the Inter-American Court of Human Rights in the *De La Cruz-Flores v. Peru* judgment. This 2004 case reevaluated the Peruvian Supreme Court's ruling against María Teresa De La Cruz, a medical professional who was prosecuted, convicted and sentenced for terrorism based on the argument that she was providing health treatment to alleged terrorists.

The Inter-American Court ruled that physicians have a right and an obligation to protect the confidentiality of the information to which they as physicians have access. The ruling also stressed the importance of modifying Peru's legislation to protect the confidentiality of medical information.

The Inter-American Commission on Human Rights has noted that issues related to sexuality and reproduction are extremely sensitive, and that when women fear confidentiality will not be respected they may avoid the medical care they need.





Case study: Karen

Manaus, Brazil: On March 23, 2013, Karen was taken by ambulance to her local hospital for emergency treatment following a self-induced abortion. She received urgent care. And then she was arrested.

Karen's story highlights the legal and medical dangers that young women face when confronting an unwanted pregnancy in a country with highly restrictive laws. Abortion is illegal in Brazil, permitted only in cases of rape, where a woman's life is in danger, and in cases of anencephaly.

Karen grew up in the Amazonian city of Manaus, in a notorious shantytown, in extreme poverty. She dropped out of elementary school and by 2013, when she was 19 years old, she was a single mother, unemployed and pregnant for the second time. Karen's relationship with her child's father was volatile; she'd filed domestic violence charges against him twice the previous year.

Karen was determined to end the pregnancy. Unable to get a legal abortion, during the fifth month of her pregnancy she took Cytotec, a drug used for treating ulcers, which can also induce an abortion. Neighbors found her bleeding profusely and called an ambulance, which took her to the local hospital where staff treated her for blood loss and performed a blood transfusion.

A police investigator went to the hospital and placed Karen under police custody. During that visit the police read Karen's medical chart, which included information that she had taken Cytotec. Three days after she arrived at the hospital, Karen was taken to jail.

PRIVATE MEDICAL INFORMATION BECOMES EVIDENCE FOR PROSECUTION

In Brazil, as in many countries with restrictive abortion laws, public hospital and health center staff—including providers, support staff and ambulance staff—are

often unclear about the law and their legal obligations. The hospital social worker overseeing Karen's case told Karen's mother-in-law to go to the police station in order to obtain the necessary documents for burial of the fetus.

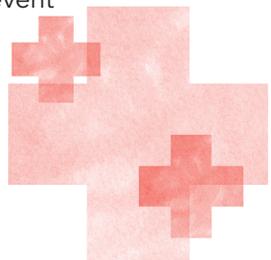
After the mother-in-law went to the station, the police reacted quickly, informing the hospital director that Karen had been detained. The evidence used against Karen, which established the basis of the state's case against her, was information obtained from her private medical records. The public prosecutor investigating the case requested testimonies from Karen's hospital team, which included a physician, nurse and social worker.

On December 19, the public prosecutor concluded the investigation, finding evidence of a crime. Because Karen did not have a criminal record, they requested probation in lieu of the minimum one-year jail sentence.

CONCLUSION

Karen's case shows that violations of confidentiality can happen at multiple levels. A breach can be explicit, when there is a legal duty to report suspicion of abortion to the police. Or as happened with Karen, a breach can occur during the investigative process when the police or a court mandates the release of private medical records. Similarly, a judge may subpoena a doctor or hospital to testify at a hearing.

This hostile legal and medical environment, created by a duty to report, contravenes women's basic human rights and promotes stigma, discrimination and acts of institutional violence against female patients in need of emergency obstetric care. Governments must fully protect patient-provider confidentiality in order to prevent women's human rights violations.



Recommendations

By turning hospitals and clinics into entry points to the criminal justice system, states are effectively creating dangerous health-care ecosystems. This hostile environment to women's sexual and reproductive health and rights contravenes the most basic rights of women. It promotes discrimination and acts of torture against female patients in need of emergency obstetric care. Rather than resist providing comprehensive reproductive health services for women, governments throughout the Americas need to return to full protection of confidentiality. It is necessary to reestablish a patient-centric health system in order to avoid preventable deaths and injuries from poor-quality care, and to prevent women's human rights violations.

Recommendations for:

International human rights bodies

- + Provide clear legal principles that outline the circumstances under which doctor-patient confidentiality applies, as well as the relevant limitations and exceptions.
- + Hold states accountable for de jure and de facto breaches of confidentiality.
- + Provide clear standards to the medical community on how legal principles should be incorporated into their practice.
- + Hold medical professionals accountable for standards and practices that breach confidentiality.

Governments

- + Restore standard ethical practices by removing all legal obligations to breach confidentiality based on

prior patient conduct, such as self-induced abortion.

- + Educate and develop proper protocols for the police force and judiciary on human rights norms addressing the conflict between evidence collection and doctor-patient confidentiality.
- + Enact and enforce laws and policies that establish a legal duty to protect patient confidentiality.
- + Develop a human rights protection mechanism for breaches of confidentiality, accessible to both patients and providers.
- + Reorient the health system to promote women's human rights by requiring medical facilities to provide and post educational materials on patients' and providers' rights and responsibilities.
- + Ensure adolescent girls are provided with additional protections, consistent with international human rights obligations, when engaging with any facet of the health system.

Health-care professionals

- + Re-establish ethical norms based on international ethical and human rights standards.
- + Raise awareness among health professionals of their legal rights and responsibilities in the health-care setting.
- + Establish third-party oversight, such as a medical board, with the capacity to hold individuals accountable for breaches of ethical duties.
- + Reorient health services to promote the provision of human rights-centered, patient-centric care.



This publication is based on research compiled by the O'Neill Institute for National and Global Health Law at Georgetown University, in partnership with Ipas.



Ipas works globally to increase women's ability to exercise their sexual and reproductive rights and to reduce abortion-related deaths and injuries. We seek to expand the availability, quality and sustainability of abortion and related reproductive health services, as well as to improve the enabling environment. Ipas believes that no woman should have to risk her life or her health because she lacks safe reproductive health choices.

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