

Gender and Drug Policy:

Considerations regarding Implementation of the 2016 UNGASS Joint Commitment

# Introduction

National Advocates for Pregnant Women (NAPW)[[1]](#endnote-1), with the support of the undersigned organizations, welcomes the opportunity to submit initial reflections to the Office of the High Commissioner for Human Rights, on the implementation of the *UNGASS Outcome Document, “Our Joint Commitment* *to Effectively Addressing and Countering the World Drug Problem,”* with regard to human rights, as well as our recommendations for ongoing implementation. NAPW is a US-based NGO in consultative status with ECOSOC that works to secure the human rights of all people, focusing particularly on pregnant and parenting women and those who are most likely to be targeted for state control and punishment – low-income women and women of color. The adoption of the joint commitment in 2016 represented an important step forward for the human rights of people affected by drug laws, evidenced in part by the *Operational recommendations on cross-cutting issues: drugs and human rights, youth, children, women and communities*. NAPW welcomed these operational recommendations and will focus this submission on that section of the *Joint Commitment*.

Two years ago, in response to the devastating impact of drug policies fueled by the global war on drugs, NAPW and our partners developed the [UNGASS 2016 Women's Declaration](http://www.ungasswomen2016.com/english). Endorsed by nearly 150 organizations that are committed to gender equality and located around the world, the Declaration calls for global leadership to adopt drug policies that support women, children and families. At the UNGASS, we witnessed unprecedented political support for addressing the impact that punitive drug policies have on women and have since seen increased momentum to address and redress counterproductive policies. In 2016, the United States collaborated with the Working Group on Arbitrary Detention, a visit which culminated in a series of well-informed recommendations. And in 2017, the US welcomed the UN Special Rapporteur on extreme poverty and human rights, whose report we eagerly await. We applaud the Special Procedures of the Human Rights Council for carrying forward this momentum.

Drug policies implicate the human rights of all women including pregnant and parenting women. The rights implicated include but are not limited to: the right to be free from arbitrary detention[[2]](#endnote-2); the right to legal counsel[[3]](#endnote-3); to privacy[[4]](#endnote-4); and to health. Through illustrative examples regarding pregnant women in the United States, this submission focuses on specific areas addressed by provisions 4. (b) and 4. (c) of the *Joint Commitment[[5]](#endnote-5)*.

# Non-discriminatory healthcare and treatment services

Sections 4. (b)[[6]](#endnote-6) and 4. (c)[[7]](#endnote-7) contain important commitments regarding the assurance of non-discriminatory access to healthcare and social services, including voluntary treatment and rehabilitation services.

Of particular importance to pregnant women, is ensuring access to timely, appropriate, and respectful healthcare, including substance use disorder treatment. Care and support should be humane, evidence-based, and trauma-informed remembering that punitive policies or approaches are widely recognized as having the effect of deterring women from prenatal care and drug treatment.

# Insights from Alabama’s arrests of pregnant women for “chemical endangerment” of children

Since 2006, more than 500 women have been charged with the crime of “chemical endangerment” in Alabama for being pregnant and using a controlled substance.[[8]](#endnote-8) Charges are typically brought after pregnant women or their newborns test positive for a controlled substance. This type of law enforcement is gender-specific, discourages women from seeking healthcare, including prenatal care, and increases stigma and fear among those in communities already targeted by law enforcement officials, such as low-income individuals and communities of color. As this statement from an Alabama pregnant woman explains: “If I had known that you go to the doctor and get a positive drug screen, I would not have gone to the doctor…I really wanted the help. But now I feel that my help is punishing me.”[[9]](#endnote-9) As Amnesty International’s Report on the Criminalization of Pregnancy documents, this Alabama woman was detained and subjected to coerced treatment with the threat of prosecution hanging over her during pregnancy.

Encouraging trust between patients and health care providers and increasing access to effective services, not punishment, is the best way to advance health, especially in impoverished communities.[[10]](#endnote-10) In his December 2017 statement after visiting Alabama, the UN Special Rapporteur on extreme poverty and human rights reinforced: “Many states have introduced highly punitive regimes directed against pregnant women, rather than trying to provide sympathetic treatment and to maximize the well-being of the fetus.”[[11]](#endnote-11)

# Insights from cases of detention and forced treatment in Wisconsin

In the state of Wisconsin, the Unborn Child Protection Act grants government officials, working with hospital staff and social workers, authority to detain a pregnant woman and to force her to submit to treatment based on evidence of any amount of current or past alcohol or drug use.[[12]](#endnote-12) In 2014, Tamara Loertscher was drug-tested and reported to county authorities, pursuant to the “unborn child abuse law”, after visiting a hospital while in the process of applying for healthcare. She was not entitled to appointed legal counsel at initial proceedings, though a lawyer was immediately appointed to represent her 14-week fetus. Following this, Ms. Loertscher was ordered into involuntary inpatient drug treatment, and later sent to jail, including solitary confinement, where she received no prenatal care.

Recognizing the increasing use of civil laws to deprive pregnant women of their physical liberty when they are suspected of substance use[[13]](#endnote-13), the 2017 Report of the Working Group on Arbitrary Detention[[14]](#endnote-14) on its visit to the United States, issued recommendations to prioritize human rights and public health in cases of substance use during pregnancy, emphasizing the importance of voluntary treatment options.[[15]](#endnote-15)

# Recommendations for ongoing implementation of the Joint Commitment

We urge states to implement provision 4. (b) by taking the following steps:

* Ensure that all drug treatment services are evidence-based and meet women’s specific medical, psychological, and social needs, especially during pregnancy and parenting.
* Through domestic legislation, establish an absolute right to assigned counsel, in accordance with existing human rights standards, for all pregnant and parenting women involved in civil or criminal proceedings related to the circumstances or outcomes of their pregnancy.

We further encourage states to implement provision 4. (c) by taking the following steps:

* Design gender-responsive and non-discriminatory drug treatment and rehabilitation programs for pregnant women.
* Implement clear guidelines to ensure the requirements of informed consent are observed in all treatment settings, including with regard to the right to refuse treatment and/or drug testing.
* Ensure pregnant women in treatment programs have access to fair trial rights, including timely access to legal representation.
* Increase funding and access for family residential treatment programs which admit pregnant women and their families.

As we consider strategies for ongoing implementation of the *Joint Commitment*, we have the opportunity rethink how to treat and effectively serve women who use drugs or are otherwise affected by drug policies. We commend the Office of the High Commission for Human Rights for its leadership on this issue and look forward to our ongoing collaboration.

**Endorsing Organizations:**

Amnesty International

Center for Health and Gender Equity (CHANGE)

Civil Liberties and Public Policy Program

Feminists for Liberty

Illinois National Organization for Women

International Centre for Science in Drug Policy (ICSDP)

NAMA Recovery

St. Ann’s Corner of Harm Reduction

Students for Sensible Drug Policy

URGE: Unite for Reproductive & Gender Equity

Women With a Vision, Inc.

1. Co-authored by Sarah Gold. [↑](#endnote-ref-1)
2. United Nations, Human Rights Council, Report of the Working Group on Arbitrary Detention on its visit to the United States of America, A/HRC/36/37/Add.2 (17 July 2017), *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/193/37/PDF/G1719337.pdf?OpenElement. [↑](#endnote-ref-2)
3. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) guarantees due process and protections against arbitrary detention. [↑](#endnote-ref-3)
4. Article 17 of the ICPR guarantees the right to privacy and protections against arbitrary interferences with privacy. [↑](#endnote-ref-4)
5. We also welcome the recommendations on treatment and informed consent in Section 1 of the *Joint Commitment*. [↑](#endnote-ref-5)
6. *4. (b) Ensure non-discriminatory access to health, care and social services in prevention, primary care and treatment programmes, including those offered to persons in prison or pretrial detention, which are to be on a level equal to those available in the community, and ensure that women, including detained women, have access to adequate health services and counselling, including those particularly needed during pregnancy.* [↑](#endnote-ref-6)
7. *4. (c) Promote effective supervision of drug treatment and rehabilitation facilities by competent domestic authorities to ensure adequate quality of drug treatment and rehabilitation services and to prevent any possible acts of cruel, inhuman or degrading treatment or punishment, in accordance with domestic legislation and applicable international law.* [↑](#endnote-ref-7)
8. Martin, Nina “Take a Valium, Lose Your Kid, Go to Jail” ProPublica (2015), *available at* <https://www.propublica.org/article/when-the-womb-is-a-crime-scene>*.* [↑](#endnote-ref-8)
9. Amnesty International (2017). Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the United States, *available at* https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf. [↑](#endnote-ref-9)
10. *See* NAPW medical/public health group statements fact sheet; *see also* American Academy of Pediatrics, Alabama Chapter, *Position on Alabama’s Chemical Endangerment Statute* (2016), *available at* <http://advocatesforpregnantwomen.org/Medical%20and%20Public%20Health%20Group%20Statements%20revised%20April%202018.pdf>. [↑](#endnote-ref-10)
11. United Nations Officer of the High Commissioner for Human Rights (2017). Statement on Visit to the USA, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights (citing NAPW’s submission to the Special Rapporteur), available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533&LangID=E*.* [↑](#endnote-ref-11)
12. *Loertscher v. Schimel & Taylor County,* 259 F.Supp.3d 902 (W.D. Wis. 2017) (law in affect pending appeal.) [↑](#endnote-ref-12)
13. In addition to Wisconsin, the Working Group identified North Dakota, South Dakota, Oklahoma and Minnesota to allow such confinement and involuntary substance abuse treatment. [↑](#endnote-ref-13)
14. United Nations, Human Rights Council, Report of the Working Group on Arbitrary Detention on its visit to the United States of America, A/HRC/36/37/Add.2 (17 July 2017), *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/193/37/PDF/G1719337.pdf?OpenElement. [↑](#endnote-ref-14)
15. *VII. 94. (a) Take affirmative steps at the federal level to maximize the availability of health care for pregnant women, including prenatal care, treatment for addiction and outpatient services, so that responses to substance use in pregnancy prioritize human rights and public health.*

    *VII. 94. (b) Review legislation and practices to ensure that any confinement of pregnant women suspected of substance abuse takes place voluntarily and respects due process guarantees. These include access to legal representation; an opportunity for women to present evidence on their behalf; a requirement that any determination with respect to the need for treatment be carried out by qualified medical professionals; and periodic review to ensure that any treatment remains necessary and appropriate.* [↑](#endnote-ref-15)